August 30, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission 445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Expanding Consumers' Video Navigation Choices and Commercial Availability of Navigation Devices.

Dear Ms. Dortch:

I respectfully request these comments be submitted to MB Docket Number 16-42.

It takes a lot of highly skilled people to make a film or TV show, and these workers generally do not own any copyright interest in the projects they help make or any equity in the production companies that hire them. Motion pictures and television production is a project-to-project business. Crew members and performers are not full-time employees of either studios or production companies and can go months between jobs. They've been "gig-economy" workers since long before anyone thought that term was a new thing.

Just like most labor in the United States, today's motion picture craftspeople are the beneficiaries of hard-fought rights—many negotiated decades ago—to share in the financial rewards of successful products they do not own. Films and TV shows are mostly made by middle-class, freelance workers whose average, annual incomes comprise not only day rates and overtime, but also residuals and health and pension benefits. These terms are negotiated and managed for most crew and performers by the unions DGA, SAG-AFTRA, and IATSE. These unions are opposed to the FCC Proposal because, as it stands, the Proposal would break the licensing structure on which their compensation packages are based.

To be a sustainable workforce, performers and crew members generally need to remain on the net-positive side of several averages—average number of days worked, average number of shows worked that succeed, and average number of shows that succeed in the market overall. By taking the macro view of the ways in which these workers are compensated over time, it's very much a rising-tide-raises-all-boats paradigm. The successful show that Props Master A works on feeds the health and pension program of Make-up artist B, who might work a show that doesn't make it. The spread of investment across multiple shows keeps the pool of skilled labor generally sustained among the various gigs and during periods of unemployment between gigs.

It should be clear to anyone that if we disrupt the means by which labor is compensated, labor has a habit of not working. In this regard, the FCC Proposal cannot be called a consumer-focused plan to introduce better and cheaper TV options if the plan simultaneously kills the means of production. This is exactly what the Proposal can do by enabling companies like Google to create a parallel, commercial video service without licensing any of the programming.

It’s Not About Boxes

Chairman Wheeler emphasizes the amount consumers spend renting set-top boxes from cable companies, and then “digital rights” groups like EFF and Public Knowledge echo the sentiment that this Proposal is about innovative technology (just like the VCR) that will give consumers more flexibility in viewing options for programming that we’re already paying for. The plan will unleash us, they say, from the rental boxes owned by the cable companies. But the rental fees argument appears to be a smokescreen for what’s really going on because the box rental part of our cable bill is not the biggest line item; there is nothing in the proposal that would technically lower the cable bill; consumers are free right now to buy boxes and not rent from the cable providers; and above all the new licensing market is already providing consumers with viewing options way “beyond the box.”

The big talking point that is most likely to confuse consumers is that the new box Google wants to sell us would only make programming available for which “we are already paying” via the MVPDS. This is the central reasoning why supporters of the proposal claim that it does not implicate copyright infringement, and it’s the kind of talking point that will sound reasonable to many people.

But this reference to our subscription fees completely misrepresents how the producers—and therefore all the labor represented by the unions—get paid for the programs they make. Our subscription fees to MVPDs do not pay to produce multi-million-dollar TV shows; they never could. The license fees paid by the MVPDs to the producers are what pay for production, and those licenses are predicated on a complex variety of ways the MVPD expects to exploit its limited or exclusive access to the content.

The simplest and most obvious example is advertising. If, under the Proposal, the MVPD that has licensed programming is forced to deliver that programming free of charge to Google—which may then re-distribute the content however it wants and advertise against the programming from its own ad services—the MVPD’s ad revenue will go down almost immediately. So, when a new slate of shows is produced, the MVPD’s incentive to pay current market-value license fees is diminished while Google, which captured part of the ad market, isn’t paying anything at all. Secondarily, new-market distribution channels like Hulu would see no incentive to license programming under such a regime. This gives lie to the notion that this entire proposal is about competition to benefit consumers rather than what it appears to be, which is a government giveaway to Google.

I never quite understand why it should be hard to recognize that less is less—that if license fees for programs go down or if new channels for licensing are cut off, there can be no result other than less production or production of lesser quality. And the Proposal would appear to create exactly these conditions—possibly more quickly than people think. The producers and MVPDs are not blind. If the Proposal were to pass as it stands, they will revise their business strategies immediately, and that could include producing considerably less work within just a couple of years. At a time when we’re clearly seeing a Golden Age of the small screen in quality writing and production—and in flexibility of viewing options—it is unfathomable that the FCC would advocate unraveling the licensing regimes that have made all this bounty possible.

What's in it for Google?

I know I've repeated Google in comments despite the fact that there are other manufacturers hoping to sell boxes under the Proposal. But if the value of getting into this line of business is predicated on advertising and data mining—which it has to be—it's pretty hard to imagine that Google would not very quickly dominate this space and become the only game in town. I understand Radio Shack, for instance, plans to make boxes, but as that company does not have an online ad business or a data mining business, their boxes would presumably serve Google's pipelines for a piece of the revenue. If that's how this would shake out, the "competition in boxes" story is an illusion.

If the producers, the MVPDs, and the unions are all correct that this plan can only undermine the means of production and inevitably reduce production quantity, quality, or both, what does even Google—let alone the consumer—gain in the long-run? When variety of quality content is reduced, then advertising value is reduced and so is data mining value. Google has a long track record of earning revenue by exploiting works it has not licensed; but in this case, its parasitical model can actually limit the means by which the company typically generates revenue. So, what is the long-term plan here? It's hard to say. But it's not hard to see in the short term how this proposal is bad for creators in the film industry and bad for consumers who want to see great television continue to thrive.

Respectfully submitted,

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